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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. **76-6575**

ROBERT PAUL LYTLE, Petitioner

-VS-

THE STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

James F. Cox
Cox & Cox, Attorneys
Allen Building
Xenia, Ohio 45385
Telephone: 372-6921
Counsel for Petitioner

and

David W. Cox
Admitted in Ohio; Not
Admitted to Practice
Before this Court

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OCTOBER TERM, 1977

NO. _____

ROBERT PAUL LYTLE, Petitioner

-VS-

THE STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

Petitioner, Robert Paul Lytle, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered December 27, 1976, rehearing denied January 20, 1977.

I. OPINIONS

The opinion of the Court of Appeals of Greene County, Ohio, Second Appellate District, State v. Lytle is not reported, but the unreported opinion is attached as Appendix A.

The opinion of the Supreme Court of the State of Ohio, State v. Lytle, 48 Ohio St. 2d 391, 358 N.E.2d 623 (1976), is attached as Appendix B. The judgment and order of the Ohio Supreme Court dated December 27, 1976 and the judgment denying rehearing, dated January 20, 1977, are attached as Appendix C and D, respectively.

II. JURISDICTION

The date of the judgment of the Supreme Court of Ohio which this petition seeks to have reversed is December 27, 1976, rehearing denied January 20, 1977. (Appendices C and D).

This Court has jurisdiction to review the judgment of the

Supreme Court of Ohio pursuant to 28 U.S.C. §1257(3).

III. QUESTIONS PRESENTED

1. Is the standard of competency of Counsel in a criminal case, especially when the death penalty is a possibility, whether it be retained or appointed Counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, Counsel "reasonably likely to render and rendering reasonably effective assistance", and isn't the petitioner prejudiced by the application of a lesser test based upon the due process/fair trial standard?

2. Is the test of competency of Counsel as set out by the Ohio Supreme Court, being whether a "fair trial and substantial justice" was done, unfair and contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States guaranteeing effective assistance of Counsel, when the Petitioner has the burden of proof to show there has been a substantial violation of any of Defense Counsel's essential duties to his client and must further show prejudice thereby?

3. Is the Petitioner denied his right to effective assistance of Counsel when defense counsel in an aggravated murder case fails to properly investigate the facts of the case, fails to comply with discovery procedure, fails to do adequate research, fails to be prepared to put on a case at the end of the state's case in chief, conveys to the defendant the false impression that he can "win" the case thus destroying a fair plea bargain, fails to have a proper grasp of the law, fails to make a competent closing argument, misrepresents to the Court as to his "retained" status, handles a legal matter which he knows or should know that he is not competent to handle, fails to raise proper objections to improper evidence, and fails to make proper constitutional objections to an illegal search and seizure and the fruits thereof?

4. Is Petitioner denied a fair trial when the Prosecution

for purpose of proving a scheme, plan or system, introduces testimony, over objection, concerning other crimes not inextricably related to the crime charged?

5. Is the Petitioner denied a fair trial and his Fourth Amendment guarantees against general exploratory searches by the introduction of evidence seized in the search of the Defendant's car, when none of the contents seized pursuant to a Search Warrant were described in the Search Warrant and when the entire movable contents of the Defendant's car were seized?

6. Does the imposition and carrying out of Petitioner's death sentence violate the Eighth or Fourteenth Amendments to the Constitution of the United States?

IV. CONSTITUTIONAL PROVISIONS

1. This case involves the Fourth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio law: Ohio Revised Code 2903.01, 2929.02, 2929.03, 2929.04, and 2945.59. These sections are set out in full in Appendix E.

V. STATEMENT OF THE CASE

Robert Paul Lytle was indicted by the Grand Jury on September 13, 1974, along with Charles Ellsworth White and David Wesley Arrasmith, for purposely causing the death of Wallace R. Archibald while committing kidnapping or aggravated robbery or while fleeing immediately after committing said offenses. The Grand Jury further found and specified that the offense was committed for the purpose of escaping detection; the offense was committed while the offender was committing or attempting to commit the crime of kidnapping; and the offense was committed while the offender was fleeing immediately after committing aggravated robbery, contrary to Section 2903.01 of the Ohio Revised Code.

Defendant was appointed defense counsel on October 2, 1974, arraigned that day and entered a plea of "Not Guilty" to the

charges contained in the Indictment.

On October 23, 1974, defense counsel moved the Court to suppress all statements made by the defendant in that he was not properly advised and was not aware of his rights against self-incrimination. Counsel also moved the Court to suppress certain evidence taken by the County Sheriff's Department in an "illegal" search of defendant's car.

The Court overruled both motions.

On October 29, 1974, the Court heard three (3) motions of defendant, to wit: Motion for Change of Venue; Motion for Bill of Particulars; Motion for a Continuance. Those three (3) motions had been filed by Rodney Keish, another attorney, without the consent or knowledge of appointed counsel, Larry Morris. Thereupon, Mr. Morris asked the Court to permit him to withdraw from the case because counsel felt he could not cooperate with Mr. Keish and that the defendant, heretofore indigent, had "retained" Mr. Keish. (R. 2-5, 14-16). Mr. Keish also had filed a Writ of Mandamus with the Court of Appeals to compel the Sheriff to allow him to see "his client". (R. 4). The Court granted the request of Mr. Morris, and Mr. Keish was approved as counsel of record, as having been retained by defendant. Dennis Sipe was also approved as co-counsel. Mr. Sipe and Mr. Keish were both Public Defenders at the time for the Greene-Clinton County Public Defender Project. The Court granted the Motion for a Bill of Particulars (R. 21) and further granted a two (2) day continuance (R. 26) setting the trial nine (9) days away instead of seven (7), but overruled counsel's Motion for Change of Venue. (R. 23).

The trial of defendant commenced November 7, 1974. Defendant requested trial by jury. At the end of the State's case, defense counsel rested without presenting any evidence. The jury returned a verdict, November 25, 1974, of "Guilty" as to the crime and all three (3) specifications included within the Indictment.

A hearing was subsequently held on January 6, 1975, to

review the reports of two (2) Court appointed psychiatrists, and the Adult Probation Authority, to hear defense witnesses, and to find if there were any mitigating circumstances, pursuant to Ohio Revised Code 2929.03(D), relative to the penalty which should be imposed upon the offender. The Court ruled, however, that those mitigating circumstances were not present and defendant was sentenced to the electric chair (R. 64-65).

On February 20, 1975, the Court appointed James F. Cox, Xenia, Ohio, as attorney for defendant in that defendant was indigent. Mr. Keish was asked to withdraw from the case at that time. A timely appeal was brought by the appointed attorney.

Six (6) Assignments of Error were taken to the Court of Appeals. The Court affirmed the lower Court's decision, rejecting the contentions that the defendant was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. The Appellate Court refused to consider defendant's arguments that the search and seizure of the defendant's car was in violation of the Fourth Amendment of the United States Constitution, and that the defendant was denied his rights as guaranteed by the Fifth, Eighth, and Fourteenth Amendments in that his counsel, though not incompetent, failed to raise timely objections and thus waived those objections. Thereupon a timely notice of appeal was filed by appointed counsel in the Supreme Court.

The Ohio Supreme Court rendered judgment in this matter, affirming the lower Court's decision, on December 27, 1976, which rehearing was denied on January 20, 1977. A copy of the Court's reported opinion is attached as Appendix B.

VI. ARGUMENT

1. Is the standard of competency of Counsel in a criminal case, especially when the death penalty is a possibility, whether it be retained or appointed Counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, Counsel "reasonably likely to render and rendering reasonably effective assistance", and isn't the petitioner prejudiced by the application of a lesser test based upon the due process/fair trial standard?

The Sixth Amendment guarantees that a criminal defendant shall enjoy the right "to have the assistance of counsel for his defense". This guarantee was first interpreted by the Supreme Court to mean the "effective" assistance of counsel in Powell v. Alabama, 287 U.S. 45 (1932). In Glasser v. United States, 315 U.S. 60 (1942), the Court stated that an inadequate performance by counsel would render a conviction void.

Following Gideon v. Wainwright, 372 U.S. 335 (1963), the courts have moved toward the civil malpractice standard of incompetency. The Third Circuit in Moore v. United States, 432 F.2d 730 (3rd Cir. 1970), rejected the old "farce and mockery" standard of justice, and adopted the standard of normal competency. The Moore Court cited the ABA Standards Relating to Providing Defense Services which state, inter alia, that, "It is implicit that representation should be adequate to the need". These standards state that counsel should have experience commensurate with the seriousness of the charge. The Eighth Circuit in McQuinn v. Swanson, 498 F.2d 207 (8th Cir. 1974), also has adopted the ABA Standards as appropriate assistance to judge ineffective counsel.

The Fifth Circuit followed the lead of the Third Circuit in the case of Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974). In Wilson v. Phand, 417 F.2d 1197 (7th Cir. 1969), the Seventh

Circuit followed the new standard of competency test. The Wilson Court abolished the distinction between retained and appointed counsel as had Moore and Hudson, and based its decision on the Sixth and the Fourteenth Amendments. Likewise, see West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973). In 1967, the District of Columbia Circuit Court in Bruce v. United States, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967) adopted the new standard. This decision was reaffirmed in Scott v. United States, 138 U.S. App. D.C. 339, 427 F.2d 609, 610 (1970).

In Ohio, the Sixth Circuit has recently laid down a reasonable competency standard in Beasley v. United States, 491 F.2d 687 (6th Cir. 1974). The Sixth Circuit held:

"The assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must, conscientiously, protect his client's interest, undeflected by conflicting considerations. Defense counsel must investigate all, apparently, substantial defenses available to the defendant and must assert them in a proper and timely manner." 491 F.2d 696

The Beasley case is clearly the leading case in the area of incompetency of counsel.

It is evident that some blunders by counsel would be incompetent under both standards, the old farce and mockery standard or the reasonable competency standard.

The Ohio Courts in State v. Cocco, 73 Ohio App. 182 (1943), and State v. Cutcher, 17 Ohio App. 2d 107 (1969), have provided examples as to what amounts to incompetency of counsel under the due process or farce and mockery standard. More importantly, the Cocco Court stated:

"A man on trial for his life, his most valuable possession, the most sacred of his guaranteed rights, is entitled to strict compliance to the rules of law, regardless of the probability or his proof of his guilt.: (Page 183).

Policy considerations are quite important here also. It is

certainly not inconceivable that lawyers should be held to a reasonable competency standard as other professionals, such as doctors.

In the case of United States v. Decoster, 487 F.2d 1197 (CA EC 1973), the Court found that the defense counsel's choices for his client were uninformed because of inadequate preparation and these in effect denied the client his Sixth Amendment rights.

It should also be noted that the standard of effective counsel as first interpreted in the Gideon case may require effective counsel to mean more than an inexperienced attorney in a murder case. This statement may be negated if such attorney has had sufficient experience so that he would be a reasonably competent criminal attorney. However, the adversary system is surely thwarted when one side is incompetent.

The Ohio Supreme Court in State v. Hester, 45 Ohio St.2d 71 (1976) has stated that the test of competency of counsel is whether the accused under all circumstances had a fair trial and substantial justice was done. This test is based on the due process/fair trial standard as used by the Courts prior to the Moore and Beasley cases. As stated in Beasley, supra, p. 694:

"It was to the guarantee of a fair trial, not the Sixth Amendment that the 'farce and mockery' standard was applied." Such a test ignores the right to counsel as guaranteed by the Sixth Amendment and only looks to the end result to see if "substantial justice was done." A man on trial for his life must receive adequate counsel. It is unfair and contrary to the Sixth Amendment directives to examine the verdict to see if the accused had a fair trial without looking to see if his representative was competent regardless of the result. How can an Appellate Court, viewing a record, even expect to find ineffective assistance of counsel by beginning its examination with a jury verdict? The right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount

of prejudice arising from its denial. The application of this lesser standard of competency of counsel and a review of the record is mandated by this Court.

2. Is the test of competency of Counsel as set out by the Ohio Supreme Court, being whether a "fair trial and substantial justice" was done, unfair and contrary to the Sixth and Fourteenth Amendments to the Constitution of the United States guaranteeing effective assistance of Counsel, when the Petitioner has the burden of proof to show there has been a substantial violation of any of Defense Counsel's essential duties to his client and must further show prejudice thereby?

The Ohio Supreme Court in Lytle developed a two-step process when considering an allegation of ineffective assistance of counsel. First, there must be a determination as to whether there had been a substantial violation of any of defense counsel's essential duties to his client. The Court did not delineate those duties nor give any clues as to what a "substantial" violation would be. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness. The Court placed the burden of proof on the defendant for reason that a licensed attorney is presumably competent.

It is evident that the Ohio Supreme Court has determined that even if there were a Sixth Amendment violation, and substantial violation of counsel's duties to his client, that if a fair trial were had, the defendant would have no recourse. This approach cheapens the right to counsel and completely ignores the reason for the Sixth Amendment. The day is long past when a violation of a fundamental constitutional right may be swept away on the basis that there was no prejudice. It is inconceivable for a Court to make this type of determination at such a late date.

How can they know what a competent counsel could have done at a trial?

Such a test of competency of counsel is unfair to the petitioner and mandates review by this Court.

3. Is the Petitioner denied his right to effective assistance of Counsel when defense counsel in an aggravated murder case fails to properly investigate the facts of the case, fails to comply with discovery procedure, fails to do adequate research, fails to be prepared to put on a case at the end of the state's case in chief, conveys to the defendant the false impression that he can "win" the case thus destroying a fair plea bargain, fails to have a proper grasp of the law, fails to make a competent closing argument, misrepresents to the Court as to his "retained" status, handles a legal matter which he knows or should know that he is not competent to handle, fails to raise proper objections to improper evidence, and fails to make proper constitutional objections to an illegal search and seizure and the fruits thereof?

ABA Standards, Defense Function 4.1, states that:

4.1 Duty to investigate.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.

Further, Rule 4.5 states:

4.5 Compliance with discovery procedure.

The lawyer should comply in good faith with discovery procedures under the applicable law.

It is evident from the record that defense counsel did not make proper investigation, nor comply with discovery procedure. (R. 556-558, 1102, 1105-1106, December 18 hearing R. 8, R. 9-10).

It is not even evident defense counsel knew the correct discovery procedure. The record shows at R. 556-557:

MR. KEISH: I would object to the introduction of any photographs into evidence, the basis being photographs have not been seen by either defense counsel prior to Court today, and therefore, there has been a failure of discovery. Also, the photographs

were marked for identification without the defense counsel's knowledge and we reserve the right to object to further introduction of the photos on relevancy and being inflammatory.

THE COURT: All right, now, the photographs have been marked and you had the right, and the Court will take note of the fact that you had the right of inspection this morning. Now, if you want further examination of those, the Court will permit that at this time. They haven't been introduced into evidence at this time, they have been marked for identification.

MR. KEISH: Yes, we will examine them.

THE COURT: All right, examine them further then.

MR. CARRERA: Your Honor, while he is examining, the State does have a position on the matter. Number one, is what the Court has already indicated, that we have not offered them as yet, but at the conclusion of this witness' testimony, we will offer them, so we might as well meet his other argument at this time. The State of Ohio, has, from the beginning of these case, indicated in open Court to this Court and to defense in all three of these cases, that no evidence would be withheld, that we had an open policy. I know for a fact that the three defense counsels originally appointed by this Court went by special arrangement to BCI to view the evidence we had at DCI. I know for a fact that Larry Morris had the coroner's report before I did, because I made arrangements with the coroner to pick it up direct, and he walked to the jail on three different occasions and got it actually in advance of the prosecution. I know for a fact that Larry Morris went over to the detective section and that they opened the file to him on anything they had in the file, which included the fact that we had these photographs. We have never refrained from showing these to anyone. Had we been asked, they would have been gladly turned over to defense counsel well in advance of this trial. Let the record show that we were never asked by defense counsel in this case at this time.

MR. KEISH: One thing further, let the record show that the defense counsel one or two or maybe three days prior to today made a motion in open Court to see any and all physical evidence that might be produced in this trial.

MR. CARRERA: Your Honor, we concur in that and we told them in open Court at that time that apparently somebody is mixed up on who has what duty, they have to come and ask to look at them, and we have never had them come over and ask to look at them.

The Court itself became bothered by the lack of discovery on defense counsel's part. The record shows at 1105-1106:

THE COURT: Well, it would appear to the Court that the defendant has a right to waive any constitutional right that he has under certain conditions. I am bothered somewhat about this question of discovery.

MR. CARRERA: Well, your Honor, all we did was tell them the whole file was open and to go to the jail and look at it, and I did not go with them, so I cannot testify that each paper was taken out and viewed, but anything they wanted was made available.

Elementary to the preparation of a criminal case, especially an aggravated murder case, is adequate investigation and research.

The record adequately shows, however, counsel was not prepared for trial. However, as late as December 18, 1974, at the hearing on the motion for a new trial, defense counsel Keish admitted:

MR. KEISH: It wasn't until that day, in open Court, and on the record, Larry Morris, on October 29th, at the hearing on the three motions, handed me, in the presence of the Prosecutor and the Court, the file, and stated to the Court and the Prosecutor that I had not seen that file before that day. I had no idea, therefore, without seeing the file, who the witnesses were going to be, what the evidence was. In fact, because of the lack of discovery, defense counsel did not know until most evidence was introduced, at trial, what evidence was going to be presented.

Further, defense counsel rested without putting on any evidence (R. 1122).

To summarize his preparation for the case, counsel further stated in the December hearing: (R. 9-10)

MR. KEISH: I think the record in this case is self-evident that defense counsel was not prepared for trial and that more time was certainly needed, and I certainly would state for the record at this time, your Honor, that defense counsel certainly feels that there was not adequate time to prepare for this trial, and we also feel that we were not prepared when the trial took place.

THE COURT: Mr. Sipe, do you agree?

MR. SIPE: Yes.

MR. KEISH: Defense counsel did not even know who half the witnesses were, even after they received their names, let alone know what they were going to testify about. Defense counsel certainly did not know when the witnesses would testify until they were called to the stand, and, as stated before, some of the witnesses were called even without notifying the defense that they would be called until right before they took the stand.

Defense counsel tried desperately to talk to some possible witnesses, but unfortunately, never did have -- defense counsel tried to talk to some possible defense witnesses, but, unfortunately, never did have enough time to prepare even one witness for trial.

Three witnesses vital to the defense of this trial were not even found until the last day of trial because they lived in Akron, Ohio, and subsequently, defense was not able to talk with them, simply because of the lack of time and simply because of a lack of time to evolve defense strategy for presentation of their testimony.

At the same time defense counsel was forced to trial, he also was burdened by a typical Public Defender case load which could not be neglected. During those nine days before trial, counsel was forced to move cases up and try to dispose of them before trial or continue them until after trial. Counsel also appeared in two County Courts, which meet in the evening on Tuesday and Wednesday during the course of this trial. One whole day of the nine days before trial was taken up by a trip to Perry County to investigate what took place there when the Defendant was arrested. During those nine days -- I don't want this to sound like a sob

story -- but the defense counsel was also in the process of moving from one apartment to another, and this could not have been avoided since my lease expired on the apartment which I was renting.

Counsel rested at the end of the state's case in chief simply because he was not even prepared to put on a case. Under any standards of competency, especially in a capital offense, said conduct was incompetent and deprived the defendant of a fair trial. More simply, however, the defendant was deprived of any trial.

Counsel was also incompetent in advising his client as to the outcome of the case. It is apparent from the record that counsel had conveyed to the defendant the idea that he could "win" the case. At the October 29 hearing on defense counsel's motion for a continuance, bill of particulars, and change of venue, the following dialogue took place as the Court entertained the request of Mr. Morris, the Court-appointed counsel, to withdraw from the case.

MR. LYTLE: Your Honor, the only thing I have to say about this is that Mr. Morris is a pretty good attorney, and so is Mr. Keish, and I would like to have them both, but Mr. Keish, I feel, can handle this case a little bit better than Mr. Morris because Mr. Morris doesn't feel that he can win this case, he has made that statement to me over the past few weeks, and I don't want to go into Court with that feeling.

MR. MORRIS: Your Honor, the statement I believe I made was that I thought that the State had a doggone good case, isn't that right, Robert?

MR. LYTLE: Yes

MR. MORRIS: And we were fighting an uphill battle as the State's case was so strong, and I think Mr. Lytle will back me up, that I made those statements to him in discussing the plea-bargaining that we were discussing previously. I wanted him to see the worst side of the case, so that he could make up his mind and look at it in the worst way, not thinking that the thing would come out that way, but I wanted him to be fully aware of the worst evidence and the worst side of the case so that he knew what he was talking about. Isn't that correct?

MR. LYTLE: That's the way I remember it.

However, Mr. Keish, in the December hearing stated that he had not really investigated the issues at that time. The record (R. 7) shows that:

MR. KEISH: Finally, the Defendant was denied counsel on or about -- and/or the effective assistance of counsel on or about October 29, 1974 when the Defendant was denied a continuance in order to adequately prepare for trial. The Defendant feels that the denial of the continuance asked for on October 29, 1974, resulted in a denial of counsel, and a denial of adequate and effective assistance of counsel for the following reasons:

As counsel for the Defendant has learned since that hearing held on October 29, 1974, at which time Larry Morris withdrew his counsel, that the Defendant, Robert Paul Lytle, was never given notice that his attorney, Larry Morris, planned to withdraw from the case. The first time that the Defendant ever knew of Mr. Morris' intentions was when Mr. Morris withdrew in open Court on October 29, 1974, without ever telling Defendant that he was going to withdraw, and co-counsel also was not aware that Mr. Morris planned on withdrawing that day and, to say the least, was surprised beyond belief when he did withdraw. It was not until that day that I ever saw the file in this case, October 29th, nine days before trial. I had no idea who the witnesses were going to be, what the evidence was; in fact, because of the lack of discovery, defense counsel did not know --

The record shows (R. 16) on October 23, 1974, that there had been plea-bargaining through appointed counsel, Mr. Morris. However, Mr. Keish, retained counsel, had convinced Mr. Lytle that he could "win" the case, and thereupon Mr. Morris withdrew from the case. On the basis of Mr. Keish's information of the case at that time, quite obviously such advice, or any advice, was incompetent.

To be competent, a lawyer should obviously have a proper grasp of law. To try an aggravated murder case, even more should be required. Although not incompetent as specific examples, the following parts of the record tend to show that counsel did not understand elementary principles of criminal law.

- a. Concept of Hearsay: (R. 708, 745-747)
- b. Concept of Impeachment: (R. 861-866)
- c. Concept of Cross-examination: (R. 890-891)
- d. Concept of Adverse Witness: (R. 1016-1018)
- e. Scope of Recall: (R. 1030-1031)
- f. Concept of Sixth Amendment: (R. 1049)
- g. Concept of Jury Instructions: (R. 1124)
- h. Badgering Witnesses: (R. 590-616, 849-948, 1035)

The Court is urged to carefully consider here the extent of Mr. Keish's grasp of the law.

In the December hearing, Mr. Keish summarized some of his apprehensions about the case (R. 11):

Defense counsel was always under the impression that a

neurological exam was to be performed upon the Defendant, yet none was ever performed. This, we feel, could have been vital to the defense after talking with the doctor, Dr. Hunt, in Columbus, who placed the plate in Defendant's head, but by the time we were aware that none had been performed, it was too late to get one, even though Dr. Hunt strongly suggested that we have one performed.

One other thing that must be pointed out, and that is the fact that defense counsel, between them, had a total of three years experience. I have been practicing two years and Mr. Sipe one. This, in itself, makes things that would seem rather simple and relatively easy for an experienced attorney, a monumental task for us as inexperienced lawyers.

All of this would have been much different, also, if we would have had the services of an investigator, but unfortunately, we did not, and at the same time we were responsible for covering two counties without the help of any other attorneys, like some law firms, since our whole program consists of myself and Mr. Sipe and one full-time and one part-time secretary. Also, during the middle of the trial, our full-time secretary was hospitalized due to an accident which severely cut veins and nerves in her right arm, and was absent for the remainder of the trial.

Although defense counsel presented no evidence, his closing argument to the jury took the offensive. To present such a defense as "accident", to negate the mens res of aggravated murder, is appropriate. However, to argue such in a closing statement, without ever having presented evidence to support the inference is clearly unprofessional and incompetent.

The record read as a whole can give the reader no other opinion than that the trial was a "mockery of justice" by any standard. The appellate court should also note DR 6-101 (A) of the Code of Professional Responsibility, which states:

(a) A Lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter with preparation adequate in the circumstances.

Clearly, counsel violated the Canons as well. Further, counsel's actions did not satisfy the Ohio test laid down in Hester, supra. The record also demonstrates that defense counsel purposely misrepresented to the Court that he had been "retained" by the defendant and therefore deprived the defendant of the benefit of experienced counsel (Dec.16, R. 21-22). The Court erred in accepting the change of counsel without proper investi-

gation (October 29, R. 17). Indeed, as Public Defender, counsel could not even take criminal cases except by appointment. Such substitution resulted in an inexperienced attorney replacing an experienced attorney, and defendant, whose life was in balance, with less than he started.

4. Is Petitioner denied a fair trial when the Prosecution for purpose or proving a scheme, plan or system, introduces testimony, over objection, concerning other crimes not inextricably related to the crime charged?

The lower Court erred in allowing into evidence prior bad acts or crimes by the defendant unrelated to the offense in issue, constituting prejudicial error pursuant to Ohio Revised Code Section 2945.59. Specifically, the Court admitted into evidence a confession of the defendant and other testimony by witnesses which contained evidence of prior bad acts, breaking and enterings and burglaries of the defendant, unrelated to the crime of aggravated murder of which he was charged. The record shows that such admissions were frequent and unambiguous.

The Ohio Supreme Court recently reviewed the admissibility of prior bad acts or crimes under ORC 2945.59 in State v. Burson, 38 Ohio St. 2d 156 (1974). The Court stated that ORC 2945.59 operates as an "exception to the general rule that the introduction of evidence tending to show that the accused has committed any crime unconnected with the offense for which he is on trial is not permitted." Evidence of prior bad acts is admissible under ORC 2945.59 only if it tends to show one of the matters enumerated in the statute and "only when it is relevant to proof of the guilt of the defendant or the offense in question". Accordingly, the Court in Burson ruled that the error in admission of such evidence "constituted prejudicial error", and so denied the defendant due process of law. See also State v. Hector, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969).

Clearly, defendant's admissions of prior bad acts contained within the confession as to breaking and enterings, committed prior to arriving at the bar to first meet the deceased Archibald, had nothing to do with any "scheme, plan, or system" of committing the alleged murder. They also could have no bearing as to proof of guilt of the defendant under the aggravated murder charge. Inadmissibility under ORC 2945.59 must be strictly construed against the State. See State v. Strong, 119 Ohio App. 31, 196 N.E.2d 801 (1963).

Although the Lytle decision stated that this evidence of prior bad acts was error, the court found that the error was harmless because there was no reasonable possibility that the testimony contributed to the defendant's conviction. It is a denial of the petitioner's right to a fair trial when such a determination is made at all and especially by the Supreme Court reviewing a transcript. How does the Supreme Court know what prompted the jury to find as it did? Is it not a reasonable possibility that evidence of burglaries contributed to at least the specifications? Such an approach mandates review by this Court.

5. Is the Petitioner denied a fair trial and his Fourth Amendment guarantees against general exploratory searches by the introduction of evidence seized in the search of the Defendant's car, when none of the contents seized pursuant to a Search Warrant were described in the Search Warrant and when the entire movable contents of the Defendant's car were seized?

The lower Court erred in admitting into evidence articles seized in the search of defendant's automobile pursuant to a Search Warrant, since the seizure violated the rules against general exploratory searches. The murder weapon was seized in this manner. The Court noted all the articles taken in the search by examining the inventory (R. 43-10/23/74). The inventory, attached to defendant's motion filed October 18, 1974, shows the items taken.

The Sheriff seized every movable object within the car, none of which was named in the Search Warrant. Elementary in the protections afforded by the Fourth Amendment of the United States Constitution is the protection against general exploratory searches. The Fourth Amendment requires that the warrant particularly state what is to be seized. See Marron v. United States, 275 U.S. 192 (1927), and United States v. Lefkowitz, 285 U.S. 452 (1932).

The Ohio Supreme Court in Wacksman v. Harrell, 174 Ohio St. 338, 341, 189 N.E.2d 146 (1963) stated that "a search warrant permits only that property which is described therein with reasonable certainty to be seized; it does not authorize indiscriminate seizure of property found on the premises". The Ohio Rules of Criminal Procedure in Rule 41(B) also cover property which may be seized with a warrant. The Rule states:

"A warrant may be issued under this rule to search for and seize any; (1) evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, of things otherwise criminally possessed; or (3) weapons or other things by means of which a crime has been committed or reasonably appears about to be committed."

The Fourth Amendment requires both particularity and probable cause. The Search Warrant was directed to articles stolen from a laundromat and a high school. None of the articles seized were relevant to the Search Warrant.

The judicial remedy for such an indiscriminate procedure is the exclusionary rule. See United States v. Lefkowitz, supra, Wacksman v. Harrell, supra, and Kremen v. United States, 353 U.S. 346 (1957).

Clearly the indiscriminate seizure of all the contents of the car, from a battery cable to a CPO jacket, without a proper Search Warrant for any of these articles, rendered the search illegal pursuant to the Kremen rationale. The proper remedy is exclusion of all evidence seized in the search.

The record shows that defendant was prompted into con-

fessing due to the gun being held and represented to him as evidence. The Supreme Court has stated explicitly in Fahy v. Connecticut, 375 U.S. 85 (1963), that a confession or admissions induced by illegally seized evidence is not admissible in a criminal trial. The general principle is stated in Ohio Jurisprudence 2d, Criminal Law, Section 179, in pertinent part:

179. Scope and Extent of Exclusionary Rule; Use of Improperly Obtained Evidence for Impeachment Purposes.-It is clear that any evidence seized from the defendant in a criminal case in violation of his rights under the Fourth Amendment, prohibiting unreasonable searches and seizures, is inadmissible at his trial, and the fruits of such evidence are inadmissible as well.

It is clear that the defendant has standing to invoke the exclusionary rule. See Ohio Jurisprudence 2d, Criminal Law, Section 180. Clearly, should the Court hold that the search of defendant's car was illegal, then the confession, which assuredly was induced by knowledge that such evidence would probably be admitted in trial, must be excluded.

6. Does the imposition and carrying out of Petitioner's death sentence violate the Eighth or Fourteenth Amendments to the Constitution of the United States?

It is apparent from reading Appendix E, the Ohio death penalty statutes, that Ohio's death sentence scheme, as construed and applied in the case at bar, is unlike any of the three schemes upheld by this Court last year in the second round of death penalty cases. The categories of mitigating factors recognized by Ohio Rev. Code §2929.04(B) are sparse, and the Ohio Supreme Court's application of the duress factor has been excessively narrow and restrictive; there is no jury participation in the sentencing decision; the defendant bears the burden of establishing at the mitigation hearing that he should not be executed; and the review accorded death sentences by the Ohio Supreme Court is indiscriminating, as is demonstrated by even a cursory glance at the decision below.

Resolution of these issues, however, cannot be confined

to the case at bar, for what is involved is not merely how Ohio's law was applied in the isolated setting of a single case, but also the rationality, fairness, and basic decency of the entirety of Ohio's statutory scheme as applied by the Ohio Supreme Court in a wide range of cases. Gragg v. Georgia, 96 S. Ct. 2909, 2938, (1976). A consideration of Ohio's law from this broader perspective will reveal that although Ohio's law is not identical to the North Carolina and Louisiana laws invalidated in Woodson v. North Carolina, 96 S. Ct. 2978 (1976); and Roberts v. Louisiana, 96 S. Ct. 3001 (1976), it affronts the very concerns underlying those cases, and therefore raises the most substantial constitutional questions.

(1) Constitutional Insufficiency of Ohio's Law of Mitigation.

Ohio Rev. Code §2929.04(B) recognizes three categories of mitigating factors. It is difficult to argue that there was evidence of mitigating circumstances in the case at bar when incompetency of counsel is the primary issue. At the mitigation hearing the Court appointed two psychiatrists to examine the defendant, but their testimony concerned only insanity. Defense counsel did not raise the issue of provocation as it would relate to Lytle being angry at White, his partner, when White hit Lytle with the baseball bat, but argued that provocation existed since Mr. Archibald, the decedant, was actually guilty of gross sexual imposition in propositioning Lytle for a homosexual act. The absurdity of this line of attack, and the repulsiveness, is quite evident. Counsel did not have Dr. Sontag, the defense psychiatrist, re-examine the defendant before the mitigation hearing and even though Sontag was available at the trial and at that hearing, along with the other two psychiatrists, he refused to put them on the stand.

a) Ohio Rev. Code §2929.04(B)(1) deems mitigating that the victim of the offense induced or facilitated it. This miti-

gating factor has not arisen in any reported case; nor is it ever likely to arise, for it is illusory. In the absence of judicial interpretation, one must make the educated guess that the factor is limited to mercy killing, for that seems to be its plain meaning. It strains credulity to posit that a mercy killer would even be charged with aggravated murder, let alone be convicted of it. Of greater importance, however, is the fact that no mitigating factor becomes relevant until the defendant has also been convicted of one or more of the aggravating specifications listed in §2929.04(A). The aggravating circumstances, however, are so inconsistent with mercy killing, that conviction of any aggravating specification will preclude the defendant from claiming mercy killing.

b) Ohio Rev. Code §2929.04(B)(2) provides for mitigation if "it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation." Mitigating duress and coercion, as applied by the court below is practically worthless. The point is made by State v. Bell, 48 Ohio St.2d 270, 358 N.E.2d 556 (1976). In Bell, the Court purported to expand the definition of duress and coercion by holding that youth and absence of a prior record were relevant considerations. 48 Ohio St.2d at 281, 358 N.E.2d at 564. Then, ignoring the evidence that Bell was 16, 48 Ohio St.2d at 270, 358 N.E.2d at 559, and that he was easily influenced by his adult companion, Hall, the Court affirmed the death sentence on the ground that Bell did not get away from Hall when he could have, and that he joined Hall in another criminal venture the next day. 48 Ohio St.2d at 282, 358 N.E.2d at 364-65.

In Bell the Court did not even allude to the obvious; that one who is easily led or influenced by another is simply not likely to break the relationship and escape. Neither concept permits the sentencer to make the kind of judgment about compara-

tive blameworthiness that Woodson and Roberts require.

The third mitigating factor mentioned in §2929.04(B)(2) is "strong provocation." This factor has not been interpreted in any reported case, so one cannot be certain of its scope. Nevertheless, it is a fact that strong provocation cannot exist in conjunction with some of the aggravating circumstances--for example, that the killing was for the purpose of escaping detection--and it is unlikely that "strong" provocation would exist in conjunction with others--for example, killing for hire or, to refer again to the most common example, felony-murder. Beyond this, however, is the fact that, under Ohio Rev. Code §2903.03, a killing that would otherwise be murder is reduced to manslaughter if it resulted from "...extreme emotional stress brought on by serious provocation reasonably sufficient to incite (the defendant) into using deadly force..." In the absence of relevant case law, the relationship between reductive provocation as it relates to manslaughter and mitigating provocation as it relates to the death penalty cannot be illuminated.

c) Ohio Rev. Code §2929.04(B)(3) treats as mitigating that the crime "...was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." The question raised by this section is whether its definition of mitigating mental condition differs in any significant respect from Ohio's case law definition of insanity as a defense. If it does not, then a verdict that the defendant is guilty of capital murder, which necessarily entails a finding that he was sane, would effectively preclude the defendant from asserting this form of mitigation.

From the face of §2929.04(B)(3), it is clear that the legislature intended to distinguish mitigating from exculpating mental condition. The question, however, is not what the legislature intended, but whether it succeeded, and, if not, whether the

legislative failure has been rectified by judicial interpretation and application. Ohio's insanity defense is defined as follows:

One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

State v. Statan, 18 Ohio St.2d 13, 247 N.E.2d 293 (1969) (syllabus 1). This definition surely suggests no easy differentiation from mitigating mental condition (whether the crime "was primarily the product of the offender's psychosis or mental deficiency"). Thus, if there is any difference between them, it must reside in Ohio's case law.

The Ohio Supreme Court has dealt with mitigating mental condition in five capital cases. It would unduly prolong this argument to discuss each of the cases in detail. Suffice it to say, therefore, (1) that the Court has read the mitigating condition narrowly by recognizing that it does not cover all mental disorders and by limiting "mental deficiency" to low intelligence or retardation, State v. Bayless 48 Ohio St.2d at 87, 95-6, 357 N.E. 2d at 1046, 1050-51 (thus blurring the distinction between mitigation and exculpation), while, in the very next case, reading the same language expansively to accord the sentencer "the broadest possible latitude" by holding that "any mental state or incapacity may be considered" short of the defense of insanity. State v. Black, 48 Ohio St.2d at 268, 358 N.E.2d at 555-56; (2) that the Court has compounded confusion by explicitly refusing to define "psychosis or mental deficiency" on the ground that "to define such terms is to narrow them," ibid.; (3) that the Court has stated that the defendant's youth is a "primary factor" in determining "mental deficiency" (without indicating how that could possibly be the case), while simultaneously upholding a death sentence imposed on a 16 year old offender, State v. Bell, 48 Ohio St.2d at 270, 282, 358 N.E.2d at 559, 565 (Lytle was 13);

and (4) that, its expansiveness in State v. Black, supra, notwithstanding, the Court has upheld the death sentence in every case in which mitigating mental condition was raised. See cases cited supra, and State v. Edwards, 49 Ohio St.2d 31, 358 N.E.2d 1051 (1976).

Taken as a whole, the Court's cases either fail to draw any distinction between mitigation and exculpation, thus rendering mitigation illusory, or so confound matters that the mitigating condition cannot be applied even-handedly as a result of the very gloss that the Court has given it.

d) Ohio Rev. Code §2929.04(B) requires the sentencer to determine whether, "considering the nature and circumstances of the offense and the history, character, and condition of the offender," a statutory mitigating factor has been established by a preponderance of the evidence. Under cover of the quoted words, the Ohio Supreme Court has stated, as indicated above, that the defendant's youth is relevant to determining mitigating duress, coercion, or mental condition; that absence of a prior record is relevant to the determination of duress and coercion, and that duress includes undue domination by another. That these statements are insubstantial (perhaps cosmetic) is indicated by the following: (1) none of the additional factors (youth, etc.) has relevance independent of the statutory factors; (2) in no case has the Court even tried to explain how youth or absence of a record might be relevant to any of the statutory factors; (3) in no case has the Court set aside a death sentence where the defendant was young or had no prior record or acted under the influence of another. Thus, the illusory nature of the statutory factors cannot be overcome by reference to additional factors.

e) It is apparent from the description of Ohio's capital-sentencing system, as interpreted and applied by the Ohio Supreme Court, that the statutory mitigating factors are illusory or

intolerably narrow at best; that this profound deficiency cannot be remedied by resorting to additional mitigating factors; and that the sentencer in Ohio is therefore precluded from considering matters which, in many other states, would serve to mitigate the death penalty. Because "...the penalty of death is qualitatively different from a sentence of imprisonment, however long...there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra at 2992. Ohio law does not permit a reliable determination of the appropriateness of the death penalty. Although Ohio's law is not identical to the invalidated laws of North Carolina and Louisiana, petitioner submits that it is too close to survive constitutional scrutiny. The matter is, of course, one of degree. But it is also one of life or death.

(2) Preclusion of Jury Participation in the Capital-Sentencing Process.

Under Ohio's scheme, issues of aggravation go to the merits. Ohio Rev. Code §2929.03(B) and (C). Consequently, they are, and must be, jury triable. Yet, aggravation and mitigation are, in Ohio, really reverse sides of the same coin: determining whether the offense is non-capital murder, in which event the death penalty is precluded, or whether it is capital, in which event the death penalty is mandatory. In effect, Ohio law recognizes the following gradations of murder: simple murder (§2903.02), punishable by fifteen years to life (§2929.02); aggravated murder (§2903.01), punishable by life imprisonment (§2929.02); doubly aggravated murder (§§2903.01 and 2929.04(A)) with a mitigating factor (§2929.04(B)), also punishable by life imprisonment (§2929.02); and capital murder, i.e., doubly aggravated murder without any mitigating factor, for which the death penalty is mandatory. Once this structure is recognized,

it becomes clear that issues of mitigation actually go to the degree of guilt, with preclusive or mandatory consequences on sentence, and that the issues should be jury triable under the Sixth Amendment. See United States v. Kramer, 289 F.2d 909, 921 (2d Cir. 1961).

From an Eighth Amendment perspective, it is clear that determining the validity of capital-sentencing statutes crucially involves "ascertaining contemporary standards of decency." Woodson v. North Carolina, *supra* at 2937. In Witherspoon v. Illinois, 391 U.S. 510, 519, n. 15 (1968), this Court, citing the Eighth Amendment case of Trop v. Dulles, 356 U.S. 86, 101 (1958), observed that "...one of the most important functions any jury can perform...is to maintain a link between contemporary community values and the penal system--a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Although that observation was made in the context of a system of uncontrolled jury discretion, it is also vital where discretion is controlled. See Gregg v. Georgia, *supra* at 2933. Ohio's law does not reflect a legislative judgment to the contrary even if such a judgment were permissible. As noted above, the Ohio legislature apparently believed that compliance with Furman precluded jury participation of any sort. That judgment, proved erroneous by Gregg, now raises substantial constitutional questions which should be resolved by this Court.

(3) Unconstitutionality of Allocating Burden of Proof to Defendant.

Ohio Rev. Code §§2929.03(E) and 2929.04(B) force the defendant to establish by a preponderance of the evidence one or more of the mitigating factors enumerated in §2929.04(B). State v. Woods, 48 Ohio St.2d at 135, 357 N.E.2d at 1065. The Ohio Supreme Court has summarily upheld the constitutionality of this procedure. State v. Sandra Lockett, 49 Ohio St.2d at 65-66, 358 N.E.2d at

1074. In In re Winship, 397 U.S. 358 (1970), this Court interpreted the due process clause in a criminal case to require allocation to the prosecution of the burden of proving beyond a reasonable doubt every essential element of guilt. As petitioner has argued before, mitigation does go to the question whether the defendant is guilty of capital murder. Hence, under Winship the state should be required to bear the burden. But the result would be no different even if mitigation were regarded as going solely to punishment, for the reach of the Winship rule was broadened in Mullaney v. Wilbur, 421 U.S. 684 (1975), when this Court invalidated a Maine procedure which placed on the defendant the burden of proving by a preponderance the existence of provocation to reduce murder to manslaughter. Even though provocation was not an element under Maine law, this Court held that Winship was applicable given the disparity in sentences for murder and manslaughter and the consequent importance of reliably determining the applicable category. Id. at 700-01. This Court regarded it as "intolerable," id. at 703, to impose a more severe sentence on the defendant "...when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence." Ibid. (Emphasis added.) In Woodson v. North Carolina, supra at 2992, this Court recognized the qualitative difference between a death sentence and any sentence to imprisonment. Under Ohio's burden of proof, a defendant can be killed when the evidence indicates that it is as likely as not that he deserves to live, although in a prison. Petitioner respectfully suggests that Ohio's burden of proof raises a most serious constitutional question.

(4) Eighth Amendment Adequacy of Scope of Review of Ohio Supreme Court.

In State v. Bayless, supra at 86, 357 N.E.2d at 1045, the Ohio Supreme Court stated that it would "independently review the

aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." That the Court has not kept its promise with fidelity to Eighth Amendment values is strongly suggested by the following:

a) In State v. Edwards, supra at 47, 358 N.E.2d at 1062, the Court, citing a pre-Furman capital case, State v. Cliff, 19 Ohio St.2d 31, 249 N.E.2d 823 (1969), explicitly stated that "in criminal appeals this court will not retry issues of fact (relating to mitigation). In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered." The "substantial evidence" test in Ohio, however, as State v. Cliff, supra, makes clear, is an inordinately narrow test, for the verdict or sentence will be sustained under it unless no reasonable mind could reach the same conclusion. Whatever the merits of the "substantial evidence" test as a device for appellate review in non-capital cases, it surely does not suffice in capital cases to insure that the death penalty is appropriate when measured by the facts of a particular case, especially when the burden of proving mitigation is on the defendant. In stark contrast to Ohio's procedure is the Florida procedure sustained in Proffitt, supra at 2966, "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida" (emphasis added).

b) In none of the nineteen cases in which the Ohio Supreme Court has sustained the death sentence has it even attempted to compare the case with any other case in which the death sentence was imposed or with any case in which the death sentence was averted.

c) In several cases, as indicated earlier, the Ohio Supreme Court has purported to interpret various mitigating factors

broadly for the benefit of the defendant. These expansive readings could hardly have been anticipated by the trial judges who imposed the death sentence, and it is likely that they used narrower standards in holding that mitigation had not been proved. Despite this, the Ohio Supreme Court has not remanded a single case for a new sentencing hearing to be conducted pursuant to the newly articulated standards. Rather, in every case, the Court has simply reviewed the record as made, without even inquiring whether the standards used by the sentencer were compatible with the standards thereafter announced. Especially in the case at bar, when the record is defective due to incompetent counsel, a complete review must occur.

Whether Ohio's system of appellate review is adequate to comply with Eighth Amendment standards is a substantial constitutional question which should be resolved by this Court.

VII. CONCLUSION

For the foregoing reasons, it is requested that a Writ of Certiorari be issued to review the decision of the Supreme Court of Ohio.

Respectfully submitted,

COX & COX

BY: 

JAMES F. COX
Allen Building
Xenia, Ohio 45385
Telephone: (513) 372-6921
Counsel for Petitioner

and

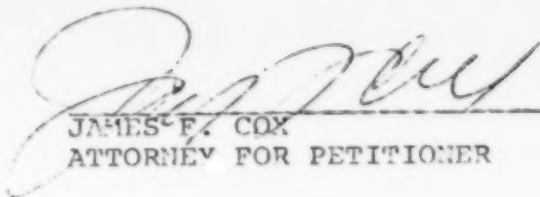
BY: 

DAVID W. COX

CERTIFICATE OF SERVICE

I, James F. Cox, counsel for Petitioner herein, hereby certify that, on the 15th day of April, 1977, I served

a copy of the foregoing Writ of Certiorari, by mailing a copy
in a duly addressed envelope, with first class postage prepaid
to R. Michael DeWine, Prosecuting Attorney, Greene County,
41 East Main Street, Xenia, Ohio 45385



JAMES F. COX
ATTORNEY FOR PETITIONER

"APPENDIX A"

IN THE COURT OF APPEALS OF GREENE COUNTY, OHIO

STATE OF OHIO

:

Plaintiff-Appellee

:

--VS--

: CASE NO. CA 858

ROBERT PAUL LYTLER

:

Defendant-Appellant

:

.....

O P I N I O N

Rendered on the 9th day of December, 1975

.....

NICHOLAS A. CARRERA, Greene County Prosecutor, 115 North Whiteman
Street, Xenia, Ohio 45385

Attorney for Plaintiff-Appellee

COX AND BRANDABUR, By JAMES F. COX, Of Counsel, Allen Building,
Xenia, Ohio 45385

Attorneys for Defendant-Appellant

.....

SHERER, J.

This appeal is from a conviction of aggravated murder and a sentence of death. The appellant was indicted on September 13, 1974 jointly with Charles E. White and David W. Arrasmith and the charge was that they caused the death of Wallace R. Archibald while committing kidnapping or aggravated robbery or while fleeing immediately after committing those offenses. The indictment specified that the offense was committed (1) for the purpose of

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escaping detection; (2) while they were committing or attempting to commit kidnapping; and (3) while they were fleeing immediately after committing aggravated robbery.

The State's case established the following facts.

After work on Friday, August 23, 1974, the victim, Mr. Archibald, and some of his co-workers at Wright Patterson Air Force Base went to a restaurant in Dayton to partake of food and drink together in order to celebrate Mr. Archibald's birthday. That same day, appellant, White, and Arrasmith had returned to Xenia to Arrasmith's home from Akron. While Mr. Archibald's birthday party was in progress, appellant and his cohorts embarked upon a burglary spree in Greene County. In one of the burglarized houses, appellant found and stole a .25 calibre Colt automatic pistol.

After the burglaries and the birthday party, Mr. Archibald's and the burglars' paths converged at the Baby Doll Lounge in Dayton. Mr. Archibald struck up an acquaintance with appellant there and, on a pretext, appellant and White enticed Mr. Archibald outside to appellant's car where appellant produced the stolen .25 calibre pistol and, at gunpoint, robbed Mr. Archibald of \$44.00. Arrasmith came out then and he and White, using Mr. Archibald's keys tried to get into Mr. Archibald's car. They were unsuccessful and, returning to appellant's car, they then drove away (Arrasmith driving) with appellant holding Mr. Archibald a

prisoner at gunpoint.

Enroute thereafter, Arrasmith stopped several times and told Mr. Archibald to debark, but appellant and White refused to allow him to leave. They drove this way to Simison Road in Greene County where Arrasmith stopped the car. Appellant and White forced Mr. Archibald to get out; following him. Appellant was carrying the gun and White a baseball bat. They took him to the rear of the car where Arrasmith followed them. Upon being informed that appellant and White intended to kill Mr. Archibald and after remonstrating with them to no avail, Arrasmith returned to the car and, as he was getting in, he observed White slug Mr. Archibald in the back of the head and saw Mr. Archibald fall to the ground.

Arrasmith attempted to drive away but stopped on a command from appellant. Then, with Mr. Archibald lying on his side, White illuminated his head with a flashlight while appellant with the muzzle of the gun very close (12 to 18 inches) to the left side of Mr. Archibald's head, put a bullet into his brain. White and the appellant ran back to the car immediately. White told Arrasmith he should have seen the shooting and gleefully described to Arrasmith how Mr. Archibald's blood spurted into the air out of his head when appellant fired. Mr. Archibald's body was found by Spring Valley policemen at 2:20 A.M. (August 24, 1974) while they were on routine patrol and, from the coroner's testimony, Mr. Archibald had been shot and killed shortly

before that time.

On September 9, 1974, appellant was arrested on suspicion of burglary in Perry County and the police there found the .25 calibre pistol which had fired the fatal bullet under the seat of his car. After his return to Greene County, appellant made a statement to the police wherein he admitted shooting Mr. Archibald, but described the shooting as a reflex action triggered by his being hit a glancing blow by the bat after it struck Mr. Archibald and while Mr. Archibald was still standing. However Arrasmith's testimony and the physical evidence flatly contradicted this version. The closeness of the gun, the angle of the bullet in the head, drops of blood around the head on the foliage, and the position of the body definitely established that the victim was lying as found when the gun was fired. Furthermore, the police testified that it was very dark out there and the appellant admitted he saw the blood spurt, thus establishing the method of shooting using the flashlight as set forth above.

After a trial which extended from November 7, 1974 until November 25, 1974, a jury found appellant guilty of aggravated murder and found the presence of all three of the aggravating circumstances set forth in the indictment. After an investigation and a hearing, the Court, not finding the presence of any of the mitigating circumstances set forth in Ohio Revised Code 2929.04(B) to have been proven, sentenced the appellant to death.

The appellant presents five assignments of error, the first of which is that he was denied the effective assistance of counsel which is guaranteed to him by the constitutions of this state and of the United States. Denial of due process is not claimed.

On September 25, 1974, one Larry B. Morris was appointed counsel for appellant by the court and on October 18, 1974, Mr. Morris filed motions to suppress appellant's statements and certain physical evidence. These motions were heard on October 23, 1974 and were overruled. On October 25, 1974, one Rodney D. Keish, filed motions for a change of venue and a continuance on behalf of appellant. At the hearing of these motions on October 29, 1974, Mr. Morris orally requested the court's permission to withdraw as counsel for appellant and permission was granted when appellant represented that he preferred and had retained Mr. Keish as his counsel. The motions were overruled although trial was continued from November 5 to November 7, 1974 because November 5 was election day. Mr. Dennis Sipe was retained as co-counsel by appellant and noted as co-counsel of record at that same time.

Trial did commence on Thursday, November 7, 1974, with Mr. Keish and Mr. Sipe as co-counsel for appellant. Six court days were consumed by the process of selecting a jury; thus the actual trial began on Friday, November 15 with Opening Statements. The presentation of testimony and of various legal arguments

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(State's case only since appellant presented no evidence and rested at the conclusion of the State's case) took five more days; from November 15 through November 21, 1974. The defense rested on Friday, November 22, 1974 and the trial was continued until Monday, November 25, 1974 for arguments and instructions. Mr. Keish and Mr. Sipe were both present throughout the entire trial and both took part in the proceedings. The appellant's complaint as to ineffective representation is, however, with Mr. Keish alone.

The claim is that Mr. Keish was incompetent, not that he was unauthorized to practice law in Ohio. If a person has been duly licensed and thus admitted to the practice of law by the Supreme Court, it is presumed that he is competent and, in the absence of clear evidence to the contrary, that he did properly represent the client who retained him during that client's trial on a criminal charge. Vaughn v. Maxwell, 2 Ohio St. 2d 299, State v. Peoples (1971), 28 Ohio App. 2d 162, 57 Ohio Opns. 2d 226.

(In order to overcome this presumption, it is not sufficient to show "inexperience or unskillfulness, lack of preparation or of interest, incompetency or inadequacy, mistakes or errors of judgment, improper advice or trial strategy in connection with the case." Annotation, 74 A.L.R. 2d 1390, 1399. See also State v. Peoples, supra, and State v. Salyer, No. 732, Clark County Court of Appeals.

The appellant cites a number of federal cases (none by

(the Supreme Court) which seem to opt for a finding of something less than normal competency as being sufficient to reverse a conviction, but the law in Ohio is established by the legislature and by the courts of this state, not by Federal intermediate courts, and it is well established that what must be shown in order to overcome the presumption of competency is that the action or inaction of trial counsel resulted in proceedings which were a farce and a mockery of justice. State v. Peoples, supra; State v. Salyer, supra; State v. Cutcher, 17 Ohio App. 2d 107; 74 A.L.R. 2d, supra, (1403); O'Malley v. United States, 285 F. 2d 733 (1961).

In his brief, appellant's counsel (who was appointed for this appeal) claims that Mr. Keish was inexperienced and points out certain actions and inactions of his which counsel avers illustrate his inexperience and which amount to incompetency requiring a reversal. There is no need to set forth and to evaluate each of these claimed infractions inasmuch as we have examined the entire record meticulously and cannot say, even assuming counsel to be correct, that the cited episodes or claimed omissions, either singly or collectively, or anything else done by Mr. Keish, turned the trial into a farce and a mockery of justice. Applying that test, the incidents referred to by counsel, applying hindsight, would show at most some possible mistakes and errors of judgment, but they hardly amount to incompetency let alone providing grounds for a reversal of the conviction.

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There is only one claim which bears mentioning specifically and that is that counsel went to trial unprepared and admitted it. This is really an allusion that the court erred in not granting a continuance. The record reveals, however, that Mr. Keish was present with Mr. Morris at the hearing on October 23 and had consulted with the appellant previous to that date although the exact time of his coming into the case is uncertain. Nevertheless the record indicates he had over two weeks before the trial commenced plus the eight days consumed by jury selection within which to prepare. Our examination of the record fails to reveal what more he, or Mr. Sipe, could have done by way of preparation which could have altered his trial strategy or have affected the outcome and present counsel for appellant does not point out to us anything specific in this regard.

Mention is made of two possible witnesses for the defense whom Mr. Keish claimed he did not locate until the last day of the trial, but he did not indicate that they were unavailable, nor did he ask (at the trial) for a short delay in order to get them there. Furthermore, these witnesses did testify at the mitigation of sentencing hearing and, if their testimony at the trial would have been the same, it is difficult to see how it would have affected the outcome thereof. However, from the state of the record, it is possible that said witnesses were deliberately withheld from the trial as a part of strategy and we are without

sufficient knowledge to say that this possible decision was not made or that it would have been incorrect.

In conclusion, appellant has not pointed out anything which Mr. Keish or Mr. Sipe could have done in order to "effectively overcome the evidence presented against him at the trial." State v. Williams, 19 Ohio App. 2d 234, 239, and we cannot find anything in the conduct of Mr. Keish which would lend merit to this first assignment of error. Accordingly it is overruled.

The second assignment of error claims that the trial court erred in overruling appellant's motions to suppress certain evidence and his confession. The evidence in question was taken from appellant's car in Perry County by the Sheriff of that county. At the hearing on these motions on October 23, 1974, a copy of the inventory of the items taken from his car which had been handed to the appellant after the search was introduced into evidence. The appellant then testified, in substance, that he had not been given a copy of the search warrant itself, that he had been arrested on a burglary charge and his car impounded, that his car was searched thereafter and he was shown a piece of paper and told that it was a search warrant. However, a Greene County deputy sheriff testified that there was a copy of the search warrant in appellant's personal effects when he was surrendered to the deputy of the Perry County authorities. The search warrant itself was not used or marked as an Exhibit at that hearing, but it was

conceded that the search was made pursuant to it.

There is a presumption of regularity when a search is made by means of a search warrant. U.S. v. Ventresca, 380 U.S. 102. Appellant did not elicit sufficient evidence to overcome this presumption. His only claim was that he was not served a copy of the warrant. However, the evidence indicated that he was so served if the court believed the deputy sheriff and the court had every right to do so. In any event, we do not believe the lack thereof would vitiate the search. The Rule (Criminal Rule 41(D)) does not require the service of a copy of the warrant before the search but only after any property is taken. This seems to have been done, since appellant had a copy in his possession.

Appellant's argument that his confession was extracted by the use of illegally seized evidence is without merit since he did not show that the evidence was illegally seized.

Most of appellant's argument in his brief on this point has to do with evidence which came out at the trial. It was too late then to object to the evidence on the ground of an illegal seizure. State v. Davis, 1 Ohio St. 2d 28, or on Miranda grounds unless that specific basis for the objection was asserted at the trial. State v. Edgell, 30 Ohio St. 2d 103. Also, appellant had had his opportunity to litigate the legality of the search and the voluntariness of the confession. This assignment of error is

overruled.

In the third assignment of error, appellant claims a violation of the general rule that evidence of the commission of other criminal acts than the one for which a defendant is on trial is inadmissible. He complains about the introduction of evidence concerning the series of burglaries perpetrated in Greene County by him and his accomplices prior to the murder; during the course of which the murder weapon was stolen. This information came in as a part of the relating of appellant's confession and of the testimony of his accomplice, Arrasmith. In addition, the deputy sheriff of Perry County who arrested appellant and found the gun stated that he was arrested on suspicion of burglary.

In the first place, there was no objection to this testimony. There was a general objection at the start to the relating of appellant's confession, but that was all, and some of the testimony came in on cross and there was no request to strike. The appellant thus waived any error and can not now predicate error when the same was not called to the attention of the court.

State v. Lancaster (1971), 25 Ohio St. 2d 83.

In the second place the evidence was admissible because part of it was relevant to the proof of the murder and all of it was an inseparable part of the whole deed: the theft of the gun, the murder, the flight to Perry County, the arrest and finding of

the gun there. Wigmore on Evidence, Sec. 218. State v. Ross,
92 Oh. App. 29.

The third assignment of error has no merit and is overruled.

The fourth assignment of error is directed to the court's failure to grant a new trial in the face of claimed violations of the rule of Griffin v. California (380 U.S. 609). Four excerpts from the closing argument (in rebuttal) of the prosecuting attorney are quoted in appellant's brief.

At the time these quoted statements of the prosecutor were made, there was no objection to them. Appellant first raised this point in a written Motion for a New Trial filed on December 9, 1974; after the rendition of the verdict. This Motion was orally argued on December 16, 1974 and a memorandum of law in support of same was filed in the trial court on December 17, 1974. Neither in the written motion, nor in the argument or memorandum did the appellant point out to the court the language of the prosecutor about which he was complaining or where it could be found in the transcript of the proceedings.

In said motion and in the argument thereon, all that was stated to the court was a general averment of a violation of the "right against self-incrimination" and that the prosecutor made "statements to the effect that the defense had not produced any

evidence," respectively, and, in the said memorandum, the appellant contented himself with the citing of two cases; Griffith v California, 380 U.S. 609 and State v. Murphy, 13 Ohio App. 2d 159. Nothing further was written or said in this regard and the court overruled the motion for a new trial.

The overruling of the motion for a new trial in this regard cannot be predicated as error inasmuch as, in the absence of an objection during the trial, none of the grounds for which a new trial may be granted, as they are set forth in Criminal Rule 33(A), were applicable thereto and, even if they were, the alleged errors were not brought to the attention of the court with enough specificity in order to be able to characterize the court's ruling as error. 3 O. Jur. 2d, 467, Section 553. Furthermore, since no objection was made at the trial level and the remarks of the prosecutor did not prevent the appellant from having a fair trial, this court can not now review the matter. 3 O. Jur. 2d 78ff, Sec. 213. State v. Glaros, 170 Ohio St. 471, State v. Lancaster, supra.

In deciding whether the cited remarks of the prosecutor did, or could have, prevented the appellant from having a fair trial, we have reviewed them and the context of their statement and cannot find anything objectionable about them. All of them were fair comments in rebuttal to arguments of the appellant and

none of them rose to the dignity of being direct comments on the failure of appellant, personally, to testify; nor did they invite inferences of guilt to be drawn therefrom. We note also that the court specifically instructed the jury to not consider the fact that appellant did not testify.

Assuming, arguendo, that the said remarks were violation of the rule in Griffin, we believe that they would constitute harmless error beyond a reasonable doubt, and so hold. Chapman v. California, 386 U.S. 18. Thus, the fourth assignment of error is without merit and is overruled.

In the fifth assignment of error, appellant claims that the death penalty and the court costs imposed upon him would amount to cruel and unusual punishment in contravention of the Eighth Amendment to the United States Constitution. There could be no valid argument in this regard if it were not for Furman v. Georgia, 408 U.S. 238, since the Constitution recognizes the existence and validity of the death penalty when it speaks of a capital crime and of being deprived of life by due process of law in the Fifth Amendment thereof. To say then that the imposition of death is in violation of the Eighth Amendment is to say that the Constitution is self-contradictory in this regard.

However, Furman, supra, held (in sum) that the imposition or withholding of the death penalty as it then was being imposed or withheld in Ohio by the jury's verdict and entirely

at their discretion alone was so devoid of standards and so arbitrary as to make it cruel and unusual because it violated the equal protection guaranteed by the Fourteenth Amendment. Since that decision, the Ohio legislature enacted Ohio Revised Code Sections 2903.01, 2929.02, 2929.03 and 2929.04 under the aegis of which the appellant was charged, convicted, and sentenced. These statutes provide, in pertinent part, as follows:

"2903.01 AGGRAVATED MURDER.

...(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, (or)...., aggravated robbery...

"(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

"2929.02 PENALTIES FOR MURDER.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code...

"2929.03 IMPOSING SENTENCE FOR A CAPITAL OFFENSE.

...(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty

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or not guilty verdict on any charge or specification.

"(C)...If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

"(2) By the trial judge, if the offender was tried by jury.

"(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

"(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

"2929.04 CRITERIA FOR IMPOSING DEATH OR IMPRISONMENT FOR A CAPITAL OFFENSE.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt.

"... (3) The offense was committed for the purpose of escaping detection,...

"... (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, (or)...., aggravated robbery...

"(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance (preponderance) of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

This procedure was followed to the letter in this case. The appellant was charged under division (B) of Section 2903.01, there were three criteria for the imposition of death from parts (A) (3) and (A) (7) of Section 2929.04 set forth in the Indictment and found to be proven beyond a reasonable doubt by the jury, and the court specifically found that none of the mitigating circumstances set forth in part (B) of 2929.04 were established by a preponderance of the evidence.

The procedures set up by these statutes and followed

in this case removed the impediment of Furman from the death penalty in Ohio. The uncontrolled discretion was removed by taking the choice from the jury. The arbitrariness was removed by the exact delineation of the acts and their attendant circumstances under which it could be imposed and by making it mandatory unless the judge found the presence of at least one of the mitigating circumstances. Thus, no one's arbitrary discretion is involved and the death penalty is certain once the described acts are committed and it is so found.

We have carefully reviewed the procedure herein and can find no error therein. The fifth assignment of error is not well taken and is overruled.

No argument was set forth in substantiation of the sixth assignment of error which was directed to "other errors manifest upon the record." Therefore, since there is nothing to decide, that assignment of error is overruled.

For the foregoing reasons, the judgment of the trial court is affirmed.

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KERNS, P.J., and McBRIDE, J., concur.

APPENDIX E

Syllabus.

Appellant contends next that due to his economic condition he was denied equal protection of the law. It is obvious from a reading of the statute that this contention is misplaced. The General Assembly, in limiting to two the number of psychologists or psychiatrists the court might appoint, also limited the expert testimony of this nature the court might consider. The statute provides, in effect, that all, including appellant, are entitled to only two witnesses of this category. We are unable to agree that the trial court either abused its discretion or denied any right, including that of equal protection, to the appellant.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, W. BROWN and R. BROWN, JJ., concur.

THE STATE OF OHIO, APPELLEE, v. LYTLE, APPELLANT.

[Cite as State v. Lytle (1976), 48 Ohio St. 2d 391.]

Criminal law—Aggravated murder—Imposition of death penalty—Constitutionality—Evidence—Similar acts—Proved, how—Error in admission of testimony harmless, when.

1. When presenting an allegation of ineffective assistance of trial counsel to a reviewing court, an appellant must initially show a substantial violation of an essential duty by that counsel.
2. For the purpose of proving a scheme, plan or system, in a prosecution for aggravated murder with specifications, it is error for the trial court to admit testimony concerning other crimes not inextricably related to the crime charged.
3. Error in the admission of other act testimony is harmless when there is no reasonable possibility that the testimony contributed to the accused's conviction. (Crim. R. 52[A]; *Chapman v. California*, 386 U. S. 18.)

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4. Ohio's statutory framework for the imposition of capital punishment is a valid constitutional enactment of law and does not violate the Constitution of the United States or of the state of Ohio. (*State v Bayless*, 48 Ohio St. 2d 73, approved and followed.)

(No. 76-143—Decided December 27, 1976.)

APPEAL from the Court of Appeals for Greene County.

After work on Friday, August 23, 1974, Wallace R. Archibald and several of his co-workers at Wright Patterson Air Force Base drove to a restaurant in Dayton. There the group partook of food and drink in celebration of Archibald's birthday.

On that same day, appellant, Robert P. Lytle, and two companions, Charles E. White and David W. Arrasmith, traveled from Akron to Arrasmith's residence in Xenia. After a brief stay, the three men decided to drive to Dayton. On the way to Dayton the trio burglarized three homes. From one of the burglarized houses appellant stole a .25 caliber Colt automatic pistol.

Later that same evening, after the birthday party was concluded and the burglaries had been committed, both Archibald and the three burglars entered the Baby Doll Lounge in Dayton. Subsequently, Archibald struck up an acquaintance with appellant. On a pretext, appellant enticed Archibald outside into appellant's car where appellant produced the .25 caliber pistol and robbed Archibald of \$44. At this point White called Arrasmith out of the bar and the two, using Archibald's keys, attempted unsuccessfully to get into an automobile which Archibald said he owned. It is unclear whether Archibald had outwitted his assailants or was merely too intoxicated to properly identify his own vehicle. All four men then drove off in appellant's car, with Arrasmith at the wheel and appellant holding Archibald a prisoner at gunpoint.

Enroute out of Dayton, Arrasmith stopped the car several times and told Archibald to get out, but White refused to allow him to leave. As they drove along Archibald was told to hand over his watch. Thereafter, White

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struck Archibald on the back of the head with a baseball bat because White believed Archibald had tricked them back in the parking lot.

When they reached Simison Road in Greene County, Arrasmith was told to stop. Appellant and White forced Archibald out of his seat and accompanied him to the rear of the car, where Arrasmith followed them. Upon being informed that appellant and White intended to kill Archibald, Arrasmith returned to the car. As he was getting into the car, Arrasmith observed White hit Archibald on the back of the head with a baseball bat, and Archibald then fall to the ground. A short time later Arrasmith heard a single shot. Appellant and White then jumped back into the car and Arrasmith drove away. As they drove, White described the shooting to Arrasmith, relating how Archibald's blood had spurted into the air from the hole in his head, and joked that he, too, would have shot the victim but he "didn't want to waste the bullet."

The trio traveled back to Xenia, stopping once to dispose of the bat. After reaching Arrasmith's residence the group divided up the money. Appellant and White then departed, heading for the Perry County home of White's parents.

On September 9, 1974, appellant was arrested on a charge of suspicion of burglary. Thereafter, the police discovered the .25 caliber pistol under the seat of appellant's car. Appellant subsequently made a statement to the police wherein he admitted shooting the victim, but described the shooting as being triggered by his receiving a glancing blow by the bat after it struck Archibald.

On September 13, 1974, Lytle was indicted for purposely causing the death of Wallace Archibald while committing kidnapping and aggravated robbery, and for the purpose of escaping detection and arrest for the above offenses. Trial was commenced before a jury on November 15, 1974. At that time the state presented Arrasmith as a principal witness. When the state concluded its case the defense rested. On November 25, 1974, the jury rendered its verdict, finding appellant guilty of aggravated murder and the three specifications thereto. After an investigation

and a hearing, the court, finding no mitigating circumstances present, sentenced Robert Lytle to death.

The Court of Appeals overruled all of appellant's assignments of error and affirmed the judgment of the trial court. The cause is now before this court as a matter of right.

Mr. Nicholas A. Carrera, prosecuting attorney, and *Mr. Stephen K. Haller*, for appellee.

Messrs. Cox & Brandabur and *Mr. James F. Cox*, for appellant.

I.

CELEBREZZE, J. In propositions of law Nos. 1, 2 and 3 appellant alleges he was denied a fair trial and substantial justice due to the ineffective assistance of his trial counsel. Appellant's claim should be viewed in the light of an unusual series of events which occurred prior to the date set for trial.

Lytle plead not guilty to all charges on October 2, 1974. On that date he was represented by attorney Larry B. Morris, who had been appointed on September 23, 1974. On October 18, 1974, Morris filed motions to suppress appellant's statements and certain physical evidence. On October 25, 1974, attorney Rodney D. Keish filed motions for a change of venue and a continuance on behalf of the appellant. At the hearing of these motions on October 29, 1974, Morris requested the court's permission to withdraw from the case. Permission was granted when appellant indicated that he preferred Keish as his counsel. Morris, who had spent in excess of 50 hours on the case at that time, agreed to comply with the court's order that he turn over the contents of his case file to Keish.

Summarizing the above, it is apparent that Keish began formal participation in the defense effort on October 25, 1974. From that date, Keish had 13 days before the juror selection process began, and 21 days before the state presented its evidence, to prepare his case. It will also be recalled that Keish had the benefit of more than 50 hours of work put in by his predecessor on the case.

Appellant's present counsel claims that Keish was in-

Opinion, per CELEBREZZE, J.

experienced, and points out certain actions and inactions which counsel now avers illustrate incompetency requiring a reversal. In particular, appellate counsel alleges the following to be errors committed by Keish:

(1) Counsel conveyed to appellant a false impression he could win, thus destroying any chance to plea bargain;

(2) Inadequate investigation by counsel, due primarily to the withdrawal of former counsel nine days prior to *voir dire*;

(3) Counsel did not have a proper grasp of the law, especially in regard to discovery procedure;

(4) Counsel rested without putting on any evidence; and

(5) The closing argument was incompetent because counsel argued defenses without first presenting evidence to support those defenses.

The phrase "effective assistance of counsel" is a term of art. Courts are, generally, reluctant to enunciate specific prophylactic rules of conduct for defense counsel. Beginning with the polestar decision in *Powell v. Alabama* (1932), 287 U. S. 45, there has developed a plethora of case authority on the meaning of "effective and substantial aid." *Powell*, at page 53. The "farce, or a mockery of justice" test has gradually been rejected, with the United States Court of Appeals for the Sixth Circuit now requiring that counsel render "reasonably effective assistance." *Beasley v. United States* (C. A. 6, 1974), 491 F. 2d 687, 696.

This court has recently announced, in *State v. Hester* (1976), 45 Ohio St. 2d 75, 79, that:

"In formulating a test for effective counsel pursuant to the Fifth, Sixth and Fourteenth Amendments, and Sections 10 and 16 of Article I of the Ohio Constitution . . . , we hold the test to be whether the accused, under all the circumstances, including the fact that he had retained counsel, had a fair trial and substantial justice was done."

In addition, we held that "[a]pplication of the test,

¹*Williams v. Beto* (C. A. 5, 1965), 354 F. 2d 698, 704. This test can be traced back to *Diggs v. Welch* (C. A. D. C., 1945), 148 F. 2d 667, 669, certiorari denied, 325 U. S. 889.

Opinion, per Czeschniewicz, J.

like the application of the exclusionary rule, must be on a case-to-case basis." *Hester* at page 80. We concluded by noting that the Pattern Rules of Court and Code Provisions, based upon the A. B. A. Standards for Criminal Justice by Wilson, for the Committee on Implementation of Standards for the Administration of Criminal Justice, and the A. B. A. Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, and Standards Relating to the Defense Function might be helpful to the trial court in deciding what is fair and adequate representation.

Appellant herein has structured his evaluation of Keish's performance in the light of those A. B. A. standards. Appellant claims that the assistance of his trial counsel did not meet the standards of skill set forth in those pattern rules, and therefore argues that he was denied competent counsel.

Although the A. B. A. standards have been cited in over 4,000 appellate decisions and codified in part in various codes of legal responsibility, they do not constitute the law of this state.²

We deem it misleading to decide an issue of competency by using, as a measuring rod, only those criteria defined as the *best of available practice* in the defense field. There are many attorneys who fail to use the best available practices, yet relatively few who are found to be incompetent.

When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth

²"The standards themselves—17 volumes and a compendium covering every phase of the criminal trial—were developed over a span of nine years by practicing lawyers, judges, and scholars. The final product is a distillation of what was considered the *best available practice in each stage of the proceeding*—from arrest through post-conviction appeal." (Emphasis added.) Pattern Rules of Court and Code Provisions (Rev. Ed. 1976), at page vi.

Opinion, per CELEBREZZE, J.

Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.

On the issue of counsel's effectiveness, the appellant has the burden of proof, since in Ohio a properly licensed attorney is presumably competent. See *Vaughn v. Maxwell* (1963), 2 Ohio St. 2d 299; *State v. Williams* (1969), 19 Ohio App. 2d 234.

On the issue of prejudice, there is no Ohio precedent, and the federal courts are in disagreement as to who must bear the burden of proof. The weight of authority places the initial burden upon the appellant since "[u]nlike a constitutional violation actually caused by the state, such as an illegal search and seizure or a coerced confession, ineffective assistance of counsel is a result of the volitional acts of one charged with representing the defendant. To impose automatically the initial burden of proof on the state * * * would penalize the prosecution for acts over which it can have no control." *McQueen v. Swenson* (C. A. S, 1974), 498 F. 2d 207, 218.

In the case at bar we find it unnecessary to determine upon whom lies the burden of proving prejudice, since we hold that appellant has not established that his counsel was ineffective. Specifically, we note the record reveals that appellant had decided to exercise his constitutional right to a trial on the charges in the indictment prior to the time when Keish replaced Morris. Appellant does not here contend that Morris was incompetent.

We also disagree with appellant's contention that his trial counsel did not conduct an adequate investigation, and that Keish was unfamiliar with the discovery procedure. First of all, the appellant chose Keish to be his advocate, despite the fact that Morris had been appointed by the court and had expended a considerable amount of time in structuring a defense. Upon his resignation from the

²Compare *Coles v. Peyton* (C. A. 4, 1968), 389 F. 2d 224, certiorari denied, 393 U. S. 849; and *United States v. DeCoster* (C. A. D. C., 1973), 487 F. 2d 1197 (burden on the government) with *United States, ex rel. Green, v. Rindell* (C. A. 3, 1970), 434 F. 2d 1112, and *McQueen v. Swenson* (C. A. 8, 1974), 498 F. 2d 207 (burden on appellant).

Opinion, per CALABREZZA, J.

defense effort Morris delivered his case file to Keish. Morris had conducted the usual discovery to that date, and thereafter Keish conferred with appellant concerning the case. Keish also filed a motion for a bill of particulars, and subsequently spent a day investigating the events surrounding appellant's arrest. We conclude that the charge of inadequate preparation is without foundation.

Appellant has argued that it was error for the defense to rest without putting on any evidence. We note that appellant had the benefit of a presumption of innocence. Appellant had the opportunity to be a witness in his own defense, but chose to exercise the constitutional privilege against self-incrimination. There is no indication in the record, nor does appellant's present counsel offer any suggestion, as to what evidence, if any, could have been presented at trial on appellant's behalf.

Finally, we find no fault with trial counsel's closing argument. At that time Keish attempted to argue the defense of accident, claiming that appellant had been inadvertently struck by the baseball bat. The following excerpt from the record illustrates that Keish did his best to establish this defense while cross-examining the state's key witness, David Arrasmith.

"Q. I want you to think real hard about this. When you got back to your house, did Lytle complain to you at all or did he show you a bump on the side of his head? Think hard on it.

"A. Not that I can remember."

"Q. And you don't remember touching his head?"

"A. Yes, I think I remember that."

"Q. To feel the bump?"

"A. Yes, I think he said he almost shot Charlie."

"Q. And was that because Charlie hit him upside the head with the baseball bat?"

"A. I don't know if he hit him or not, but that's what he said."

Accordingly, we reject appellant's contention that he was denied a fair trial and substantial justice due to the quality of the assistance rendered by his trial counsel.

Opinion, per CELEBREZZE, J.

II.

In his propositions of law Nos. 4, 5, 6 and 7, appellant argues that the trial court erred in overruling his motion to suppress evidence obtained during a search of his vehicle. At the time it was seized, Lytle's automobile was parked on a public roadway, in front of a house belonging to the parents of Charles White. Appellant first claims that the subsequent search was illegal because no search warrant was issued before the vehicle was seized. It is not disputed that a warrant was issued after the car was impounded, and no search was conducted until after the warrant was obtained.

Beginning with *Carrol v. United States* (1925), 267 U. S. 132, there has developed a line of decisions establishing that less stringent warrant requirements apply to the search and seizure of an automobile, as opposed to the search of private residences or offices. A factor underlying this development has been the exigent circumstances that exist in connection with movable vehicles. "... [T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable." *Chambers v. Maroney* (1970), 399 U. S. 42, 50.

When considering whether the lack of a warrant to seize a vehicle invalidates a later search pursuant to a warrant, we believe the *Chambers* case to be dispositive. "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." *Chambers*, at page 52. Appellant does not contend, and we are unable to conclude, that there was a lack of probable cause to search his vehicle. There existed a distinct possibility that a friend or relative of co-defendant White would remove the vehicle, or tamper with its contents. Because the same considerations of "exigency and immobilization apply here, as

Opinion, per CLEGG, J.

they did in *Chambers*, we reject proposition of law No. 4.

Appellant next argues, in the alternative, that evidence obtained during the search of his vehicle should be excluded since the search violated the Fourth Amendment proscription against general exploratory searches. The warrant here involved specified that the affiant sought to recover 102 packages of cigarettes, a pair of field glasses, an electric calculator and \$200 in change taken from a juke box and a cigarette vending machine. The offenses which purportedly gave rise to the appellant's possession of these goods were the breaking and entering of a laundromat and a high school. However, the inventory listing the property seized discloses that although none of the specified items were found, the officers seized two baseball bats, a .25 caliber Colt pistol and an assortment of tools, including chisels, crowbars and a hacksaw.

We believe that the searching officers could reasonably have believed that the items seized were either the "fruits of crime" (the baseball bats), or "weapons or other things by means of which a crime has been committed or reasonably appears about to be committed" (the tools and the pistol). See Crim. R. 41(D). We therefore reject appellant's proposition of law No. 5.

In his proposition of law No. 6, appellant claims that the Greene County authorities improperly obtained the .25 caliber Colt pistol in violation of the directives in Crim. R. 41(D), since Perry County authorities delivered the murder weapon to Greene County authorities to use as evidence in the prosecution for murder. Crim. R. 41(D) provides, in pertinent part: " * * * Property seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant."

We believe the last sentence of Crim. R. 41(D) was intended to insure that the property seized under a warrant is not destroyed or otherwise misused. Appellant cites no authority which would support his narrow interpretation of the rule, and we feel that both policy and practical considerations militate against such an interpretation. We thus find no merit in this proposition.

Opinion, per CELEBREZZE, J.

and until the accused gives evidence of his good character. Although character is not irrelevant, the danger of prejudice outweighs the probative value of such evidence. The danger of prejudice is at its highest when character is shown by other criminal acts, and hence the rule that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some purpose other than to show a probability that the individual committed the crime on trial because he is a man of criminal character. See McCormick on Evidence 447 (2d Ed.), Section 190.

In Ohio, the purposes for which evidence of other criminal acts may be offered are enumerated in R. C. 2945.59. That section provides as follows:

"In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

In discussing the application of R. C. 2945.59, this court noted, in *State v. Burson* (1974), 38 Ohio St. 2d 157, at page 158, that " . . . evidence of other acts of a defendant is admissible *only* when it 'tends to show' one of the matters enumerated in the statute and *only* when it is relevant to proof of the guilt of the defendant of the offense in question."

The present appeal concerns appellant's conviction on the charge of aggravated murder while committing kidnapping and aggravated robbery, and thus the question is whether the prosecution's "other acts" testimony tended to prove motive, intent, absence of mistake or accident, or scheme, plan or method, in committing the above-stated offense. The state argued, and the appellate court so held, that the testimony relating the burglaries was ad-

Opinion, per CLEVELAND, J.

In proposition of law No. 7, appellant re-argues a factual dispute. It is his contention that a Perry County deputy sheriff seized his automobile in Muskingum County. He then concludes that the deputy was outside the territorial jurisdiction of the Perry County court which issued the search warrant.

The record reveals that the seizure was made in Roseville, a town which straddles the Perry County—Muskingum County line. In addition, the seizure was made before the search warrant was issued, due to the presence of exigent circumstances. It is not disputed that when the vehicle was searched it was within Perry County. We therefore reject this proposition of law.

III.

In his proposition of law No. 8, appellant asserts that the trial court erred in overruling his motion to suppress the statement in which he confessed to the murder of Wallace Archibald. We have already determined that there was no illegality in the seizure and subsequent search of appellant's automobile. Accordingly, we reject appellant's contention that the confession should have been ruled inadmissible as the "fruit" of this search.

IV.

In proposition of law No. 9, it is argued that the trial court erred by allowing into evidence testimony relating prior bad acts or crimes committed by the appellant. Specifically, the trial court admitted in evidence a confession by the appellant and testimony by Arrasmith which contained references to burglaries and breaking and entering offenses allegedly perpetrated by the appellant and his accomplices on the day of the murder.

The appellate court ruled that the above evidence was admissible because it was relevant to and an inseparable part of the sequence of events; the burglaries, the theft of the .25 caliber pistol, the murder, the flight to Perry County, the subsequent arrest and discovery of the gun. On this point we disagree with the appellate court decision.

Generally, the prosecution is forbidden to introduce initially evidence of the accused's bad character, unless

Opinion, per CELEBREZZE, J.

missible in that it tended to show appellant's scheme, plan or system.

In *State v. Curry* (1975), 48 Ohio St. 2d 66, this court had occasion to construe the "scheme, plan or system" language of R. C. 2945.59. The first of two general factual situations set out in *Curry* is comparable to the case at bar, that being the situation in which the "other acts" form part of the immediate background of the crime charged in the indictment. We held, at page 73, that "[i]n such cases, it would be virtually impossible to prove that the accused committed the crime charged without also introducing evidence of the other acts. To be admissible pursuant to this sub-category . . . the 'other acts' testimony must concern events which are *inextricably related to the alleged criminal act.*" (Emphasis added.)

That situation is not present in this case. We believe that it would have been possible to prove that the appellant committed the aggravated murder without introducing testimony disclosing the burglaries. Because the "other acts" were not inextricably related to the crime charged in the indictment the lower court erred in admitting such testimony.

We consider then whether this error requires the reversal of the guilty verdict, or whether it may be termed harmless. In order to hold error harmless, this court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *State v. Abrams* (1974), 39 Ohio St. 2d 53; *Chapman v. California* (1967), 386 U.S. 18.

In this appeal, we have reviewed a confession by appellant, in which he admits to having shot the victim in the head. At trial, testimony was given by David Arrasmith, an accomplice of appellant at the time of the murder. That testimony was substantially similar to appellant's confession, with Arrasmith giving a detailed account of how appellant kidnapped Archibald, took \$44 from him at gunpoint, and subsequently shot him in the head on a desolate country road.

Upon consideration of the above evidence we believe it most unlikely that the "other act" testimony contributed in any noticeable degree to appellant's conviction for

the purposeful killing of Archibald. At worst, the testimony established that the appellant had stolen the murder weapon. We therefore find no reasonable possibility that the improperly-admitted "other act" testimony contributed to the appellant's conviction, and hold that the error committed was harmless beyond a reasonable doubt. In addition, we note that there was no objection or request to strike by trial counsel at the time this disputed testimony was elicited. Accordingly, proposition of law No. 9 is overruled.

V.

In his proposition of law No. 10 appellant asserts that the prosecutor's closing argument was improper under the rule formulated in *Griffin v. California* (1965), 380 U. S. 609, in that certain comments had the effect of penalizing appellant for exercising his Fifth Amendment privilege against self-incrimination.

We find no fault with the state's closing argument. The comments by the prosecution did not focus attention on the silence of the appellant, but rather reminded the jury that the state's case had not been rebutted. Moreover, the trial court instructed the jury that appellant's failure to testify should not be considered for any purpose. Therefore this proposition of law is without merit.

VI.

In his final proposition of law, No. 11, appellant characterizes the death penalty as cruel and unusual punishment, and thus in violation of the Eighth and Fourteenth Amendments to the United States Constitution. We have determined, in *State v. Bayless* (1976), 48 Ohio St. 2d 73, that Ohio's capital punishment legislation is constitutional, and hence we disregard this last contention.

VII.

No error prejudicial to the appellant having been found, we hereby affirm the judgment of the Court of Appeals.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, W. BROWN and P. BROWN, JJ., concur.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, }
City of Columbus. }

19⁷⁶ TERM

To wit: December 27, 1976

State of Ohio
Appellee,

No. 76-143

vs.

APPEAL FROM THE COURT OF
APPEALS

Robert Paul Lytle,
Appellant.

for Greene County

This cause, here on appeal from the Court of Appeals for Greene County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 28th day of February, 1977, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correctional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Greene County,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for GREENE County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this day of 19

Clerk

Deputy

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, }
City of Columbus. }

19⁷⁶ TERM

To wit: December 27, 1976

State of Ohio,
Appellee,

No. 76-143

vs.

MANDATE

Robert Paul Lytle,
Appellant.

To the Honorable.....COMMON PLEAS COURT
Within and for the County of.....GREENE....., Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that the execution date be set for Monday, February 28, 1977.

THOMAS STARTZMAN,
Clerk

.....19.....
.....
.....Deputy

RECORD OF COSTS

Docket Fee	\$.....	Paid by Affidavit of Poverty
Docket Fee	\$.....	Paid by.....
Docket Fee	\$.....	Paid by.....
Printing Record	\$.....	Paid by.....
Supplemental Record	\$.....	Paid by.....
Sheriff's Costs	\$.....	Paid by.....
Sheriff's Costs	\$.....	Paid by.....

APPENDIX D

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, }
City of Columbus. }

1977... TERM

To wit: January 20, 1977.....

The State of Ohio,
Appellee,

vs.

Robert Paul Lytle,
Appellant.

No. 16-143.....

REHEARING
GREENE COUNTY

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio,
do hereby certify that the foregoing entry was correctly copied from the records of

said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed
my name and affixed the seal of the Supreme Court
this.....day of..... 19.....

..... Clerk.

By Deputy.

THE STATE OF OHIO, }
City of Columbus. }

19⁷⁷ TERM

State of Ohio,
Appellee,

To wit: January 20, 1977

vs.

Robert Paul Lytle,
Appellant.

No. 76-143

E N T R Y

(GREENE COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

C. William Skel

CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio,
do hereby certify that the foregoing entry was correctly copied from the records of
said Court, to wit, from Journal No. Page

IN WITNESS WHEREOF, I have hereunto subscribed
my name and affixed the seal of the Supreme Court
this 20th day of January 19⁷⁷

THOMAS L. STARTZMAN

Clerk.

By Deputy.

HOMICIDE

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

HISTORY: 134 v H 511, ER 1-1-74.

Not analogous to former RC § 2903.01 (196 v 114), repealed 134 v H 511, § 2, ER 1-1-74.

The effective date of H 511 is set by section 4 of the act.

PENALTIES FOR MURDER

§ 2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised

Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

HISTORY: 134 v H 511, ER 1-1-74.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-

examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v H 511, ER 1-1-74.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance [preponderance] of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

HISTORY: 194 v R 811, ER 1-1-74.

AMENDMENT [VIII]

[PUNISHMENT FOR CRIME]

* Excessive bail shall not be required, nor excessive fines imposed, nor * cruel and unusual punishments inflicted.

§ 2945.59 Proof of defendant's motive.
(GC § 13444-19)

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

HISTORY: ER § 13444-19; 119 v 123 (199), ch. 25, § 19, ER 16-1-58.

AMENDMENT [IV]

[SEARCHES AND SEIZURES]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V]

[RIGHTS OF PERSONS]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI]

[RIGHTS OF ACCUSED]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT [XIV]

[RIGHTS OF CITIZENS]

§ 1 * All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall * make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State * deprive any person of life, liberty, or property, without due process of law; nor * deny to any person within its jurisdiction the equal protection of the laws.